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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT and
SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF *AMICI CURIAE* ARIZONA, HAWAII, IDAHO, NEBRASKA, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, UTAH, WASHINGTON, WYOMING, AND TEXAS DEPARTMENT OF WATER RESOURCES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Endangered Species Act requires the Secretary of Interior to restore listed species to original population levels by utilizing resources authorized by Congress for reclamation purposes where the intent of the reclamation statute can be achieved without jeopardizing the continued existence of endangered species.

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INTEREST OF *AMICI*

Amici curiae herein are vitally concerned with the proper use and conservation of all natural resources. Acting alone, and in concert with the Federal Government, *amici* have created and are administering numerous programs aimed at wise resource management. Among the most important of these programs are those that pro-

vide for the proper allocation and beneficial use of water and those aimed at protecting plants and animals threatened with extinction.

In 1902, Congress enacted the Reclamation Act, which was intended to harness western waters and reclaim arid western land. 32 Stat. 388 (1902). Projects constructed under the Act are located in each of the *amici* States. Such projects consist of diversion dams, storage reservoirs and other water works, which have developed significant water supplies currently being used in the West. Fundamental to the reclamation program is its reliance on state law to govern rights to the water developed by these reclamation projects. *See California* v. *United States*, 438 U.S. 645 (1978).

In 1956, Congress enacted the Washoe Project Act, 70 Stat. 775 (codified as amended at 43 U.S.C. §§ 614-614(d)), a reclamation law authorizing construction of the Stampede Dam and Reservoir on the Little Truckee River. Congress intended that the water stored by the dam be used for reimbursable purposes such as irrigation, power generation, and municipal, industrial and domestic water supply. These uses are referred to as reimbursable because water users are required to contract with the Bureau of Reclamation to repay their share of construction, operation, and maintenance costs associated with the project.

The Carson-Truckee Water Conservancy District negotiated a contract with the Bureau of Reclamation for repayment of reimbursable project costs for the Stampede Dam. The contract was never signed by the Secretary of Interior, however, and the Secretary has refused to honor its provisions. In fact, since completion of the Stampede Dam as a reclamation project, the Secretary has refused to use any of the water developed by the dam for reimbursable purposes. Instead, the water has been allocated entirely for protection of two endangered or threat-

ened species, the Lahontan cutthroat trout and the cui-ui sucker.

The Ninth Circuit approved the Secretary's refusal to make any water available for reimbursable purposes and held that no water could be used for those purposes, at least until the two species have been restored and delisted. This decision misread federal law. Moreover, the court's ruling may have a significant, adverse impact on reclamation projects throughout the West. In particular, the holding could affect the relationship between the Endangered Species Act and other federal statutes in such a way that funds authorized for any of a number of specific purposes will be used solely to rehabilitate endangered species. For these and other reasons the *amici* feel compelled to urge this Court to grant Nevada's petition for a writ of certiorari and reverse the Ninth Circuit's decision.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit Court of Appeals Erred in Approving the Secretary of Interior's Actions in the Instant Case Because the Secretary Lacked Authority to Carry Out Those Actions.

In its ruling below, the Ninth Circuit Court of Appeals upheld the Secretary of Interior's decision to manage water from the Stampede Dam solely for the enhancement of habitat for the cui-ui and Lahontan cutthroat trout, two endangered or threatened fish species. The court referred to Section 7(a)(1) of the Endangered Species Act, which requires the Secretary of Interior to review programs administered by him and to "utilize such programs in furtherance of the purposes of this chapter" and Section 2(c)(1) of the Act, which declares as policy that all federal agencies should "seek to conserve endangered and threatened species and * * * utilize their authorities in furtherance of the purposes of this chapter." Section 3(3) defines "conserve" as using "all meth-

ods and procedures * * * necessary to bring any endangered * * * or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. §§ 1536(a)(1), 1531(c)(1), 1532(3). The court reasoned that the Act imposed a duty on the Secretary to utilize all resources authorized for reclamation purposes for the sole purpose of species restoration.

The flaw in this reasoning is that the Endangered Species Act instructs the Secretary with regard to his "programs" and "authorities." Nowhere in the Act is the Secretary authorized, much less directed, to convert resources authorized for reclamation purposes in order to rehabilitate endangered species. The Secretary simply is not empowered to utilize resources authorized for specific purposes under one statute, the Washoe Project Act in this instance, for the entirely different purpose of species restoration, where these resources can be used for the purpose for which they were intended without jeopardizing the continued existence of endangered species. This reclamation use is consistent with the mandate in the Endangered Species Act that "[e]ach agency shall * * * insure that any action authorized, funded or carried out by such agency * * * *is not likely to jeopardize* the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2) (emphasis added). Not only does the Endangered Species Act not contain an independent sanction for a program of species restoration at the expense of the Secretary's other statutory responsibilities, but clearly there was no reason for the Court of Appeals to create one in this case. As explained below, there already existed a program administered by the Secretary to further the purposes of the Endangered Species Act with regard to these particular species.

Secretarial authority to conserve the cui-ui and Lahontan cutthroat was established by Congress when it enacted the Washoe Project Act in 1956. As part of that

Act, Congress directed the Secretary to provide facilities for increased water releases from Lake Tahoe and to restore the Pyramid Lake fishery. Pursuant to this directive, the Secretary built a fish hatchery for the enhancement of the Pyramid Lake fish population, constructed the Marble Bluff Dam for fish flow regulation in the Truckee River, and built the Pyramid Lake fishway. Congress provided a $2 million expenditure for fishery enhancement out of a project budget of $52 million. 43 U.S.C. §§ 614(c), 614(d).

This program gives the Secretary authority to rehabilitate the Pyramid Lake fishery and to conserve and protect the cui-ui and Lahontan cutthroat trout. If the Secretary wishes this program to be enhanced, the appropriate recourse is to the Congress, not to the reclamation program. This is the type of program and authority envisioned by the provisions in the Endangered Species Act requiring the Secretary to use his programs and authorities to conserve endangered species. General statements contained in the "Policy" or "Purposes" sections of the Act (*i.e.*, Section 2(c)(1) as quoted above) do not add to the Secretary's authority.

This Court's decision in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), is not to the contrary. In that case, the Government could build the Tellico Dam and destroy the snail darter or not build the dam and leave the snail darter's habitat intact. *Id.* at 171. In disallowing construction of the dam, this Court did not interpret the Endangered Species Act to provide any federal official with the authority to use resources associated with the construction of the dam *to enhance* the snail darter population.

Here the Secretary is not forced to choose between two mutually exclusive courses of action, *i.e.*, utilize the Stampede Dam for reclamation purposes as Congress directed *or* protect endangered species from jeopardy. The issue, rather, concerns the extent of the Secretary's

obligation to restore the cui-ui and Lahontan cutthroat under the Endangered Species Act in view of the Secretary's responsibilities under the Reclamation Act. In this case, the Washoe Project Act provides the Secretary with authority to take actions to restore the two fishes, and it defines the Secretary's responsibilities under the Reclamation Act. These responsibilities are fully compatible: water *can be withdrawn* from Stampede Dam for reimbursable purposes *without jeopardizing* the continued existence of the cui-ui or the Lahontan trout.

Nevertheless, the Ninth Circuit allowed the Secretary to disregard his responsibilities under the Washoe Project Act to develop water for reclamation purposes. The court approved the Secretary's actions in converting Stampede Dam into a rehabilitation project for the cui-ui and Lahontan cutthroat. This result is contrary to both the Washoe Project Act and the Endangered Species Act. For this reason, this Court should grant Nevada's petition for certiorari to review the Ninth Circuit's decision.

2. The Standard Approved by the Court Below of Requiring Restoration of Endangered Species in Reviewing Agency Actions is Contrary to the Decisions of this Court and Other Circuit Courts of Appeals.

In the decision below, the Ninth Circuit established a standard under the Endangered Species Act that is in direct conflict with the standard required by the Act and implemented by this Court. The court below concluded that the Endangered Species Act sanctioned a federal agency's action to restore a species with resources intended for or generated by a federal reclamation project at the expense of the congressionally established purposes for which the project was intended. In contrast, this Court and other circuit courts of appeals have reviewed agency actions in question against the congressional directive that such actions not jeopardize the continued

existence of endangered species. In fact, in adopting a standard of restoration, as opposed to the absence of jeopardy, the Ninth Circuit stands alone.

No other court has ruled that federal agencies have a duty to marshall authorities and resources for restoration of endangered species at the expense of their primary statutory responsibilities. Instead, in *TVA* v. *Hill*, this Court applied the standard requiring "all federal agencies 'to *insure* that actions *authorized, funded*, or *carried out* by them do not *jeopardize* the continued existence' of an endangered species" 437 U.S. at 173 (quoting 16 U.S.C. § 1536; emphasis by the Court).

Likewise, other courts of appeals have based their rulings on the principle that the Act requires federal agencies to insure that their actions will not jeopardize listed species. *See, e.g., Roosevelt Campobello Int'l Park Comm'n* v. *Environmental Protection Agency*, 684 F.2d 1041, 1052 (1st Cir. 1982); *North Slope Borough* v. *Andrus*, 642 F.2d 589, 607, 609 (D.C. Cir. 1980); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303-04 (8th Cir. 1976); *National Wildlife Federation* v. *Coleman*, 529 F.2d 359, 371 (5th Cir.), *cert. denied sub nom. Boteler* v. *National Wildlife Federation*, 429 U.S. 979 (1976).

Consideration of the consequences of interpreting the Act to impose a duty on federal agencies to restore species using resources authorized for other purposes illustrates why agency actions have instead been scrutinized as to their potential jeopardy. A duty of restoration would essentially convert every federal authorizing statute that might affect endangered species habitat into an "Endangered Species Rehabilitation Act." Congress did not intend this result. Congress intended that its directives be carried out in concert with the goal of conserving endangered species by assuring that federal agencies, while engaged in carrying out their primary missions, take the steps necessary to insure that their actions

not jeopardize the continued existence of endangered species. The decision below to the contrary should be reviewed by this Court and reversed.

3. The Decision Below Conflicts with Sound Public Policy.

The Ninth Circuit's ruling in this case would require the Secretary of Interior to manage other reclamation projects that affect the critical habitat of endangered species in a fashion similar to Stampede Dam. His discretion in such management would apparently be limited only by his judgment as to the steps necessary to rehabilitate affected species.

Since the Endangered Species Act directs all federal officials to "utilize their authorities in furtherance of the purposes" of the Act, 16 U.S.C. § 1536(a)(1), the Ninth Circuit's ruling reaches beyond the Secretary of Interior to the heads of other federal agencies. Thus, funds authorized to carry out such federal acts as the Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-529, the Federal-Aid Highway Act, 23 U.S.C. §§ 101 *et seq.*, and numerous others, could be used by federal administrators solely to rehabilitate endangered species populations. Congress did not contemplate such a result. This is especially true with regard to the development of water resources.

The Endangered Species Act states:

> It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

16 U.S.C. § 1531(c)(2). Congress clearly intended that federal agencies involved in water resource development undertake to protect endangered species while carrying out their primary missions.

Sound public policy requires that federal agencies comply with congressional mandates in a manner that will

not jeopardize the existence of endangered and threatened species. Where there is no conflict between the federal agency's primary mission and continued existence of an endangered species, the agency should have neither the duty nor the discretion to ignore specific congressional directives. In most cases, careful planning will allow both objectives to be met. In this regard the legislative history of language from the Endangered Species Act quoted in the paragraph above is instructive. The committee report on the language states:

> [T]he purpose of the amendment is to recognize the individual States' interest and, very often, the regional interest with respect to water allocation * * *. [T]his amendment recognizes that most of the potential conflicts between species conservation and water resource development can be avoided through close cooperation between local, state and Federal authorities.

S. Rep. No. 97-418, 97th Cong., 2d Sess. 25 (1982).

Amici support restoration of endangered and threatened species. However, *amici* believe that resources for such restoration should come by way of specific congressional authorizations, not through unilateral reallocation of resources by a federal agency.

In July of 1984, the Department of Interior released an updated list of endangered and threatened species. The list includes nearly 60 endangered or threatened *fishes* alone. Over half of these have a historic range that includes one or more Western States. Fish and Wildlife Service, U.S. Dep't of Interior, *Endangered and Threatened Wildlife and Plants* 17-18 (July 20, 1984). Development of water resources nearly always affects stream flow. With endangered species located in many western lakes and streams, it seems certain that water resource development will continue to present a potential impact on endangered species. The Ninth Circuit holding in the

instant case ignores needs and uses for water other than species rehabilitation. The decision also disregards the will of Congress in enacting the Washoe Project Act. The ruling is contrary to the interests of sound public policy and should be reviewed by this Court.

CONCLUSION

For the above reasons, *amici* urge this Court to grant Nevada's petition for a writ of certiorari and reverse the decision of the Court of Appeals.

Respectfully submitted,

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